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No.

In the Supreme Court of the United States

FLOYD STRICKLAND,

Petitioner,

v.

SCOTT ABBOTT, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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I. Issues Presented for Review

A. Whether the district court erred in finding that Strickland's Fifth Amendment right against double jeopardy was not violated.

B. Whether the district court erred in finding that Strickland's Fourth Amendment rights protecting him from unreasonable searches and seizures was not violated?

C. Whether the district court erred in finding that Strickland's Sixth Amendment right to effective assistance of counsel was not violated.

D. Whether the district court erred in finding that Strickland's rights to a fair trial as guaranteed by the Sixth Amendment and to due process of law as guaranteed by the Fifth and Fourteenth Amendments were not violated when he was when the prosecution engaged in misconduct.

E. Whether Strickland Made a Substantial Showing of the Denial of His Rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution Requiring That a Certificate of Appealability Be Issued on Each of the Issues Above.

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IV. Opinions below

The judgment of the United States District Court for the District of Wyoming, Floyd Strickland v. Scott Abbott, Warden, 04-CV-330-ABJ, is not reported. The Tenth Circuit Court of Appeals' decision, Floyd Strickland v. Scott Abbott, Warden, 05-8062, is also unreported.

V. Statement of the Basis of Jurisdiction

The district court had jurisdiction under 28 U.S.C. § 2254. The Tenth Circuit had jurisdiction under 28 U.S.C. § 2253. This Court has jurisdiction under 28 U.S.C. § 1254(1), as the circuit court has rendered a final decision on this civil habeas corpus action.

VI. Constitutional Provisions Involved

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

U.S. Const. Amend. IV.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process

> of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. V.

> In all criminal prosecutions, the accused shall enjoy to right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. Amend. VI.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.

VII. Statement of the Case

The instant case occurs from events arising in the summer of 2000. On June 17, 2000, Strickland returned to his home in Casper, Wyoming from a vacation. Strickland discovered that his home had been damaged by fire in his absence, prompting a phone call to local law enforcement officials. Officer Richard Brown responded to the call. Officer Brown was pointed to the garage as a point of entry for a possible intruder, but found no evidence of forced entry.

The next day, Officer Michael Concepcion arrived at Strickland's residence to investigate the fire. Strickland admitted Officer Concepcion into the residence. Strickland pointed Officer Concepcion to the garage, where pry marks and a screwdriver not belonging to Strickland were discovered. Officer Concepcion then took pictures throughout the residence. Officer Concepcion then telephoned a fire inspector to be sent to the scene. According to Officer Concepcion, the house was "sparse" with not much hanging on the walls or on top of dressers.

Harold Morrow, a fire investigator, next arrived at Strickland's residence. Morrow obtained permission from Strickland to enter the home. Morrow identified the origin of the fire as a small utility closet in the basement. Morrow then called Fire Chief Rich Carpenter to the residence. Carpenter arrived and ascertained that the fire had been deliberately set. Morrow then obtained consent from Strickland to search the residence. Carpenter thereafter found evidence regarding the intentional setting of the fire. Morrow then informed Strickland that the fire had been caused by arson.

Detective Derrick Dietz was then called to the scene. Dietz also noticed that the walls were sparsely decorated and that things appeared to be missing from the closets. Dietz then transported Strickland to the police station. After being questioned regarding inconsistencies in his story, Strickland left the police station. Detective Dietz thereafter obtained a search warrant to search Strickland's business office, finding personal possessions unrelated to Strickland's business in boxes throughout the office.

David Harvey conducted an investigation of the fire for the insurance company, which denied Strickland's claim and voided the policy on his residence. Harvey also concluded that the fire was an arson. (Id). Subsequently, Strickland was indicted by a Grand Jury for the Seventh Judicial District for

Natrona County, Wyoming in a two count information charging hm with: first degree arson in violation of W.S. § 6-3-101 (Count One); and second degree arson in violation of W.S. § 6-3-102 (Count Two).

Strickland pleaded not guilty and proceeded to trial. Jury trial started on June 18, 2001 in the Seventh Judicial District Court for the County of Natrona, Wyoming. Despite Strickland's requests that his attorney present an alibi defense and expert testimony in his defense, counsel failed to present an alibi defense or call expert witnesses and Strickland's behalf. Additionally, the prosecution introduced evidence ruled inadmissible by the trial court without objection from defense counsel. The jury returned a guilty verdict as to all charged counts on June 22, 2001. Strickland was sentenced on August 30, 2001 to a term of 120 to 216 months imprisonment on Count One and 60 to 08 months on Count Two, to be served concurrently.

Strickland filed a motion for a new trial, unsuccessfully arguing that: (i) the court erred in denying Strickland's motion for judgment of acquittal; (ii) the verdict is contrary to the weight of the evidence; (iii) the court erred in admitting hearsay evidence; (iv) the court erred in admitting the testimony of several witnesses, as such testimony was unsubstantiated and misleading; and the court erred in several other evidentiary rulings; (v) Strickland and his property were subject to an illegal search and seizure in violation of the Fourth Amendment to the United States Constitution; (vi) the prosecution engaged in prejudicial misconduct; and (vii) Strickland was denied effective assistance of counsel in that counsel failed to properly investigate and prepare for trial. Strickland amended this motion, arguing the following additional issues: (viii) the court erred in its jury instructions, as the instructions were decided outside of Strickland's presence, denying him his right to be present at all material

proceedings against him; and (ix) that the prosecution failed to disclose evidence in its possession.

On appeal to the Wyoming Supreme Court, Strickland argued:

(i) the evidence was insufficient to convict Strickland of first degree arson; (ii) counsel was ineffective for failing to call an expert witness and submit jury instructions on specific intent and on an alibi defense; (iii) the trial court was in error in omitting the words "towards another" in the jury instruction defining "maliciously"; (iv) the district court failed to sufficiently instruct the jury on the specific intent element of both first-degree arson and second-degree arson; (v) the district court erred in failing to appoint substitute counsel for Strickland; (vi) the district court erred in denying Strickland's motion to suppress evidence; (vii) the district court erred in admitting into evidence the written report of arson investigator Harry Morrow; (viii) the sentencing court erred in unlawfully banishing Strickland from Natrona County; (ix) cumulative error was committed in this case; (x) Strickland's right to be free from double jeopardy was violated when he was convicted of both first-degree arson and second-degree arson; (xi) the State's repeated introduction of impermissible 404(b) evidence and other conduct constituted prosecutorial misconduct denying Strickland a fair trial; and (xii) Strickland's right to due process and a fair trial was violated due to prosecutorial misconduct.

The Supreme Court of Wyoming issued an opinion based upon the merits affirming the decision of the lower court on July 30, 2004, but vacating the portion of Strickland's sentence banishing him from Natrona County. The court noted that although the prosecution engaged in several instances of misconduct, such misconduct constituted harmless error.

Strickland subsequently filed, *pro se,* a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 with the United States District Court for the District of Wyoming on November 24, 2004. Strickland reasserted each of the constitutionally based arguments made in his appeal to the Wyoming Supreme Court, arguing that: (i) the convictions were obtained in violation of the protection against double jeopardy; (ii) the convictions at issue were obtained by use of evidence obtained pursuant to an unlawful search and seizure; (iii) the convictions were obtained in violation of the right to effective assistance of counsel; and (iv) the convictions were obtained in violation of Strickland's right to due process of law and a fair trial as a result of prejudicial prosecutorial misconduct.

On June 15, 2005, the district court denied relief upon the merits. Strickland filed a notice of appeal and request for certificate of appealability on July 7, 2005. On September 20, 2005, the district court denied Strickland's request for a certificate of appealability.

Strickland then proceeded to the Tenth Circuit Court of Appeals requesting certificate of appealability and filing an appellate brief making the following arguments: (1) the district court erred in finding that strickland's fifth amendment right against double jeopardy was not violated, (2) the district court erred in finding that Strickland's Fourth Amendment rights protecting him from unreasonable searches and seizures was not violated, (3) the district court erred in finding that Strickland's Sixth Amendment right to effective assistance of counsel was not violated, and (4) the district court erred in finding that Strickland's rights to a fair trial as guaranteed by the Sixth Amendment and to due process of law as guaranteed by the Fifth and Fourteenth Amendments were not violated when he was when the prosecution engaged in misconduct.

Subsequently, on April 11, 2006, the Tenth Circuit issued a written opinion denying relief on all grounds. Strickland now prays that this Court grant writ of certiorari and correct the constitutional violations that occurred in the state court.

VIII. Argument Addressing Reasons for Granting the Writ

Under Supreme Court Rule 10, a petition for writ of certiorari will be granted for compelling reasons. Those reasons include, but are not limited to the following circumstances: "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." S.Ct.R. 10(c). Such is precisely the case here.

Strickland's Fifth Amendment right to be free from double jeopardy was violated when he was convicted of both first-degree and second-degree arson under Wyoming law, despite the fact that the statutes contain no practical difference in obtaining a conviction. There are not any facts that must be proved for conviction of one degree of arson as opposed to another degree. As applied to Strickland's case, if the jury found him guilty of second degree arson, he was also necessarily guilty of first degree arson resulting in multiple punishments, violating the prohibition against double jeopardy. Thus, both the Wyoming High Court and the Tenth Circuit decisions conflict with Blockberger v. United States, 284 U.S. 299, 304 (1932).

Strickland's Fourth Amendment right to be free from unreasonable search and seizure was also violated in this matter. Law enforcement and fire officials worked together to mislead Strickland into signing a consent form to search his residence, informing Strickland that a search was being made

for the cause of the fire. In reality, law enforcement officials were searching for evidence to be used against Strickland for an arson charge. Such misinformation permitted law enforcement officials to avoid obtaining a search warrant based upon probable cause, which was necessary in this case. Thus, both the Wyoming High Court and the Tenth Circuit decisions conflict with Michigan v. Clifford, 464 U.S. 287 (1984).

Strickland also received ineffective assistance of trial counsel. Counsel failed to submit either a theory-of-the-defense instruction or an alibi instruction. Counsel failed to present a defense expert who would have supported Strickland's theory that he did not start the fire at issue. As such, and without any instruction as to the applicability and importance of Strickland's alibi, the jury was left with little choice but to return an erroneous conviction against Strickland. Thus, both the Wyoming High Court and the Tenth Circuit decisions conflict with Strickland v. Washington, 466 U.S. 668, 686 (1984).

Strickland's Fifth, Sixth and Fourteenth Amendment rights to due process of law and a fair trial were violated based upon the improper actions of the prosecution in this matter. The State introduced evidence of prior bad acts and evidence of Strickland's mental health issues despite the fact that such acts had previously been ruled inadmissible. The prosecution also made improper personal attacks against defense counsel. Thus, both the Wyoming High Court and the Tenth Circuit decisions conflict with Berger v. United States, 295 U.S. 78, 88 (1935).

Finally, Stickland made a substantial showing of the denial of his rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, requiring at minimum that a certificate of appealability be issued on each of the issues above. Thus, both the district court and the

Tenth Circuit decisions denying certificate of appealability conflict with Miller-El v. Cockrell, 123 S.Ct. 1029, 1039, 1045 (2003).

A. Strickland's Fifth Amendment Right Against Double Jeopardy Was Violated.

Strickland's right to be free from double jeopardy was violated when he was convicted of two different arson statutes that required the exact same proof on the same elements of the crimes. Furthermore, even if the arson statutes vary in some manner, the lower courts failed to grant relief upon the fact that the same acts erroneously formed the basis for multiple punishments. Therefore, Strickland's convictions should be vacated.

The Fifth Amendment states that "nor shall any person be subject for the same offense to be twice put in jeopardy. This right against double jeopardy is important because it is manifestly unfair to mete out multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711 (1969).

The question of what exactly constitutes the "same offense" for double jeopardy purposes is a continually developing area of law. This Court dealt with the issue in Blockburger v. United States, 284 U.S. 299 (1932), holding "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." 284 U.S. at 304. Under the Blockburger test, a court looks to the statutory elements of the crime charged to determine if there is any overlap. The Supreme Court has further clarified that so long as each provision "requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial

overlap in the proof offered to establish the crimes." Iannelli v. United States, 420 U.S. 770, 785 (1975).

In the instant case, Strickland was convicted of first degree arson in violation of W.S. § 6-3-101 and second degree arson in violation of W.S. § 6-3-102. A person is guilty of first-degree arson if he maliciously starts a fire or causes an explosion with intent to destroy or damage an occupied structure. W.S. § 6-3-101. A person is guilty of second-degree arson if he starts a fire or causes an explosion with intent to destroy or damage any property to cause collection of insurance for the loss. W.S. § 6-3-102. So, both statutes require an intent to destroy property.

Although it appears that first-degree arson requires a malicious act, it is not actually the case. In Keats v. State, 64 P.3d 104 (Wyo. 2003), it was stated that the malicious act whit not have to be directed toward another. However, one must wonder how an act can be malicious if the act is not directed toward another. Common sense dictates, therefore, that malice is not an element of first degree arson. Therefore, malice is not an element that differentiates first degree arson from second degree arson.

The only other element listed in the statutory language of conviction in the instant matter that differentiates the convictions is that second degree arson must be done for insurance gain. However, the distinction is illusory as arson will nearly always result in insurance gain, as most buildings are insured against loss by fire. The language of the second degree arson statute does not specify that the person committing the arson be the beneficiary of the insurance gain. Without the language regarding insurance and without the element of malice, there are not any facts that must be proved for conviction of one degree of arson as opposed to another degree. As applied to Strickland's case, if the jury found him

guilty of second degree arson, he was also necessarily guilty of first degree arson.

Importantly, in reaching its decision on the instant issue, the Supreme Court of Wyoming was unable to support the notion that convictions for first and second degree arson did not raise double jeopardy concerns with appropriate state law. Strickland v. Wyoming, 2004 WY 91 (Wy. 2004). In fact, the Wyoming Supreme Court could only draw tangential parallels with the statutes at issue with statutes in Connecticut, Indiana, and Michigan, all of which involved arson statutes that contained at least one element differentiating it from an arson statue of a lesser degree. Id.

Second, assuming that a distinction exists between the two statutes at issue, Strickland submits that improper double punishment occurred because Strickland was issued multiple sentences for a single act. As noted above, under Wyoming law, an act alone can constitute malice. See Keats, 64 P.3d at 104. As a result, a citizen of Wyoming engaging in conduct that qualifies as second-degree arson would necessarily be guilty of first-degree arson. Because malice does not have to be directed at another person but can be inferred from the act, a person who stars a fire with intent to destroy or damage property that happens to be occupied in order to cause collection of insurance for the loss will have committed both first and second-degree arson. A single act would thus result in multiple punishments, violating the prohibition against double jeopardy, as occurred in this case.

However, the district court found that Strickland was not convicted in violation of the principles of double jeopardy. Utilizing the test for evaluating double jeopardy claims as put forth in Blockburger, *supra*, the district court found that first-degree arson under Wyoming law protects victims from arson where an inhabited structure is set afire, while second-degree arson protects victims of insurance fraud. Under the

Blockburger test, a court looks to the statutory elements of the crime charged to determine if there is any overlap. However, the district court was incorrect in its application of the Blockburger. Importantly, Blockburger does not mention analyzing the difference in statutes according to whom the statute is meant to protect. Yet, the Tenth Circuit erroneously upheld this reasoning.

The district court's reasoning was incorrect and failed to address the fact that the statutes at issue are effectively identical, meaning that Strickland's right to be free from double jeopardy was violated. Even the district court admitted that the state court ruling on this issue was supported by "sparse" discussion. This is not surprising because improper decisions often lack sufficient case law for support. Even looking at the case law cited by the district court in support of the decision of the Wyoming Supreme Court on this issue, one sees a list of case law from other states, none of which involve an arson statute akin to the statue at issue here.

The district court erred in stating that Strickland's convictions and subsequent sentences were not imposed in violation of the prohibition against double jeopardy. Accordingly, Strickland's convictions must be overturned.

B. Strickland's Fourth Amendment Rights Protecting Him from Unreasonable Searches and Seizures Was Violated.

Strickland's Fourth Amendment right to be free from unreasonable searches and seizures was violated in this case. Law enforcement officials never obtained a search warrant, but instead used trickery and deceit in obtaining involuntary consent to conduct an administrative search, and then exceeded the scope of this search to conduct a criminal search.

The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

U.S. Const. amend. IV. "The basic purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Michigan v. Tyler, 436 U.S. 499, 504 (1978). The reach of this Amendment "extends beyond the paradigmatic entry into a dwelling by a law enforcement officer in search of fruits or instrumentalities of crime." Id.

If evidence is seized illegally by the police, the exclusionary rule will generally apply and any evidence obtained as a result of such search will be barred from admission at a defendant's trial. The Supreme Court has held that even evidence *indirectly* obtained through an illegal search or an illegal arrest may be excludable "as fruit of the poisonous tree." Wong Sun v. United States, 371 U.S. 471, 484-87 (1963). The Court stated:

> We need not hold that all evidence is 'fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has come at by exploitation of that primary illegality or instead

> by means sufficiently distinguishable to be purged of primary taint.

Id. at 487-88.

The government's right to intrude upon the privacy of the home is narrowly circumscribed by the Fourth Amendment's prohibition against unreasonable searches and seizures. The expectation that one generally remains free from warrantless searches in the privacy of the home is at the heart of the Fourth Amendment. See, Silverman v. United States, 365 U.S. 505, 511-12 (1961). The Fourth Amendment has drawn a firm line at the entrance to the house. In fact, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." United States v. United States District Court, 407 U.S. 297, 313 (1972). Absent exigent circumstances, that threshold may not be crossed without a warrant. Payton v. New York, 445 U.S. 573, 589-90 (1980). Similar language is omnipresent in the Supreme Court's Fourth Amendment jurisprudence. See, e.g., Winston v. Lee, 470 U.S. 753, 761-62 (1985) (explaining that "[i]ntruding into an individual's living room" to conduct a search "damage [s] the individual's sense of personal privacy and security and [is] thus subject to the Fourth Amendment's dictates").

It is true that government officials can conduct a warrantless search pursuant to a plan of administrative inspection. New York v. Burger, 482 U.S. 691 (1987). Arson investigations have been held to be administrative searches, in that immediate determination of a fire's origin is necessary to prevent recurrence. Michigan v. Tyler, 436 U.S. 499 (1978). However, later decisions demonstrate that the extent of such a search is limited.

In Michigan v. Clifford, 464 U.S. 287 (1984), the Court noted that no warrant is necessary for a post-fire investigation

conducted within a reasonable time. Id. However, if the aim of the post-fire search is to gather evidence of criminal activity as opposed to searching for the cause of the fire, then a search warrant supported by probable cause must be obtained. Id. at 294-95. In Clifford, the arson investigation expanded to a search for criminal activity, including a search of an area of the home where the fire did not occur, pictures taken of the entire house, and a search of closets. Id. at 291.

In the instant case, there can be no doubt that Strickland's right to be free from illegal searches and seizures was violated. Just as in the Clifford case, the authorities exceeded the purpose of the administrative search of Strickland's residence and conducted the search to gather evidence of criminal activity. Strickland's residence was subject to a search by two police officers, two fire investigators, and a police detective. Rather than limiting the scope of the search to determine the origin of the fire, pictures were taken throughout Strickland's residence and evidence was seized.

Of course, as noted by the district court, a consent form for the search was signed by Strickland. However, the consent form was merely given to authorize a search for the cause of the fire, not to collect evidence for a criminal prosecution, which is necessarily more intrusive. Furthermore, the form did not give permission for evidence to be seized against Strickland.

Strickland notes that a waiver of a constitutional right, such as a right to be free from unreasonable searches and seizures, must be made voluntarily and intelligently. Hopkins v. Anderson, 507 F.2d 530 (10th Cir. 1974). In determining whether a given waiver was voluntary and intelligent, a reviewing court must examine whether the waiver was made "with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748 (1970). Consent is not valid if obtained through fraud or

trickery. See United States v. Buchanan, 904 F.2d 349, 355 (6th Cir. 1990); United States v. Turpin, 707 F.2d 332, 385 (8th Cir. 1983).

In the instant case, Strickland was not informed of the reason for the search of his residence, except that it was to find the cause of the fire, which is odd in itself, considering that the cause of the fire had already been determined to be arson. Strickland was unaware that his residence was being searched for evidence for a criminal prosecution against him, with evidence being seized by law enforcement officials. Had Strickland known that the authorities had an agenda of building a criminal case against him, rather than attempting to find the perpetrator of the offense, he would not have consented to allowing law enforcement officials search his residence without making them obtain the proper warrants had he been aware that such an option existed. Strickland was unaware that the consent form that he signed would allow law enforcement officials to act as if a search warrant had been obtained. As such, the consent given by Strickland for the search of is residence was not valid. The subsequent search, and all evidence obtained as a result thereof, where therefore obtained in violation of the Fourth Amendment to the United States Constitution.

Despite the facts of the case, the district court believed that Strickland's Fourth Amendment claim was fully and fairly litigated before the state courts. See, Stone v. Powell, 428 U.S. 494 (1976). However, as there is some indecision on whether a district court can raise this procedural question *sua sponte*, the court undertook an evaluation of the claim on the merits, where it was denied. The district court noted that Strickland admitted the evidence technician to his residence on June 18, improperly concluding that this obviated any Fourth Amendment error.

Importantly, the technician's actions were only taken after law enforcement officials had made an initial illegal search, as Fire Investigator Morrow requested a consent to search the residence for the cause of the fire, not for evidence of criminal activity. Furthermore, the fact that Strickland did not object to such action is of little consequence, as no case law suggests that a criminal defendant must object to the illegal actions of the state while such actions are occurring.

The court noted that Strickland's reliance on the decision issued in Michigan v. Tyler, 436 U.S. 499 (1978) was misplaced, as the Tyler case dealt with an arson investigation in which no consent was received to conduct any search. The pivotal fact in Tyler, however, was not consent, but that regardless of consent, a properly obtained search warrant based upon probable cause is needed to make any investigation beyond the immediate cause of a fire. See Tyler, supra. A warrant was not obtained in this case, and the investigation into the cause of the fire spilled into an impermissible search of Strickland's residence in a criminal investigation against Strickland, in violation of Strickland's Fourth Amendment right to be free from unreasonable searches and seizures. Therefore, Strickland's convictions must be overturned.

C. Strickland's Sixth Amendment Right to Effective Assistance of Counsel Was Violated.

Strickland's Sixth Amendment right to effective assistance of counsel was violated, requiring that Strickland's convictions be overturned. Counsel's actions fell below a reasonable expectation of competency in several instances. Strickland complained of his attorney's ineffectiveness prior to trial in a letter/petition he sent to the court on May 21, 2001. In that letter Strickland asked for a hearing concerning his attorneys ineffectiveness, but the trial court refused. Subsequently, at trial counsel failed to call an expert witness

on behalf of Strickland and also failed to request jury instructions supporting Strickland's theory of the case. Had counsel preformed adequately, Strickland would not have been convicted.

The Sixth Amendment to the United States Constitution guarantees that criminal defendants are entitled to the assistance of counsel in presenting their defense. "The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process." Kimmelman v. Morrison, 477 U.S. 365, 374 (1986). Furthermore, the U.S. Supreme Court has recognized that "the right to counsel is the right to effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 (1970).

To succeed on a claim of ineffective assistance of counsel, a defendant must show that his "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). In order to prevail on an ineffective assistance of counsel claim, the defendant must satisfy Strickland's two-prong test, demonstrating that the representation received "fell below an objective standard of reasonableness" and "a reasonable probability [exists] that but for counsel's unprofessional errors, the results of the proceedings would have been different." Strickland, 466 U.S. at 688, 694. The prejudice that must be shown need not be anything more than something as small as one additional day in jail. Glover v. United States, 531 U.S. 198, 204 (2001).

"It is the client's right to expect that his lawyer will use every skill, expend every energy, and tap every legitimate resource in the exercise of independent professional judgment on behalf of the client and in undertaking representation of the client's interests." Frazer v. United States, 18 F.3d 778, 785

(9th Cir.1994). "Defense counsel must do his utmost to bring his legal acumen to bear on behalf of the defendant; keep the defendant fully informed of developments in the case and consult with the defendant on all major decisions to be made; conduct a reasonable pre-trial investigation, which should include contacting potential witnesses; prepare adequately and professionally for trial; conduct the trial to the best of his ability; and, at the bottom, serve as a vigorous and devoted advocate of the defendant's cause." United States Ex. Rel. Partee v. Lane, 926 F.2d 694, 702 (7th Cir. 1991).

A defendant's right to effective assistance of counsel confers a duty on counsel to conduct an adequate pre-trial investigation. ABA Standards Relating to the Administration of Criminal Justice confirms that:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

Standard 4-4.1. Failure to investigate the defendant's alibi and interview potential witnesses can rise to the level of ineffective assistance. Powell v. Alabama, 287 U.S. 45, 58, (1932). In certain circumstances, failure to investigate a defense would amount to ineffective assistance of counsel requiring a reversal of the conviction. Bryan v. Mullin, 335 F.3d 1207 (10th Cir. 2003). Further, counsel has a duty to investigate, and that duty extends to all investigation which is reasonable. Wallace v. Ward, 191 F.3d 1235, 1247-48 (10th

Cir. 1999). Counsel also has a duty, in deciding how best to investigate, to be responsive to the wishes of his client. Romano v. Gibson, 239 F.3d 1156, (10th Cir. 2001).

In the instant case, several instances of ineffective assistance of counsel were raised by Strickland in the district court.

(1) Counsel Failed to Refute the State's Theory of the Fire Origin with Available Expert Testimony.

First, defense counsel failed to call an expert witness that could have confirmed this theory of defense. The defense failed to call Dr. Gerald Hurst to testify, despite the fact that Dr. Hurst's testimony would have supported Strickland's theory of defense. Dr. Hurst, a chemist specializing in the field of fire and explosion analysis, has spent more than 30 years investigating cases such as the one at issue. The state claimed that the fire was started in this case from a lit candle, placed atop a rack above crumpled, gasoline soaked newspaper. A thin layer of flammable vapor was then created, according to the state, until the candle burned down to this level, igniting a fire.

According to Dr. Hurst, this theory is flawed for several reasons. First, gasoline vapor will diffuse at a much greater rate than the burn-down rate of a candle. Second, the rate of increase in the volume of gasoline vapor is increased substantially by turbulence induced by the movements of a person in the room. Third, thermal currents such as those produced by a water heater or a candle flame induce eddy currents which increase the diffusion of gasoline vapor. Finally, gasoline vapor which is allowed to stand in a closed compartment for a relatively short period of time will produce a substantial explosion upon ignition, leaving visible evidence

of that explosion. All of this information was presented in Strickland's post-conviction briefs and memoranda.

Dr. Hurst informed defense counsel well before trial that he would be willing to investigate the instant matter and testify as to his findings. However, defense counsel, even after Dr. Hurst offered to work for free on behalf of Strickland, failed to call Dr. Hurst as a witness. Without Dr. Hurst's testimony, it is clear that Strickland's theory of the case could not be presented with any likelihood of success. Without bringing this evidence to the attention of the court, Strickland's defense was left to his own testimony claiming innocence. Of course, without the expert testimony that Dr. Hurst would have provided refuting the state's theory of the fire's origin, Strickland's assertions of innocence was of little value or credibility.

Clearly, counsel had a duty to present the strongest possible defense for Strickland, a duty that was not fulfilled in the instant matter. Counsel's performance in failing to utilize Dr. Hurst as an expert witness on behalf of Strickland renders counsel's assistance below any objective standard of reasonableness. Certainly, the decision to omit evidence demonstrating Strickland's innocence in favor presenting no evidence of his innocence cannot be considered strategic decision. Such a characterization is beyond comprehension. Strickland was prejudiced by counsel's failure, in that he was denied the opportunity to present his theory of defense, a theory that would have resulted in acquittal.

However, the district court stated that the Wyoming Supreme Court's decision denying relief on the ineffective assistance of counsel claim was correct. It was argued that the failure to call an expert witness on Strickland's behalf was a tactical decision, placing the decision beyond review on ineffectiveness grounds. However, no court to this date has stated what tactic was being employed by defense counsel. If

the tactic being utilized "is not clear", then how can the tactical decision be clearly labeled as reasonable? Moreover, it is utterly ridiculous to claim that the failure to present evidence in the form of expert testimony in this case was merely a "tactical decision." As such, contrary to the district court's commentary, Strickland received ineffective assistance of counsel at trial and his convictions should be reversed.

(2) Counsel Failed to Request Appropriate Jury Instructions

In addition to omitting evidence that refuted the state's case against Strickland, defense counsel also failed to request appropriate jury instructions. Counsel did not request a "theory of the defense" instruction, an alibi instruction, and a specific intent instruction. Without guidance from such instructions, the jury had only the instructions regarding the State's case to follow, leaving the jury unable to return an acquittal based upon Strickland's alibi defense.

In Delli Paoli v. United States, 352 U.S. 232 (1957), the Supreme Court emphasized the importance of the petit jury and its ability to be impartial and follow the court's instructions to the letter of law.

> It is a basic premise of our jury system that the court states the law to the jury and that the jury applies that law to the facts as the jury finds them. Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. Based on faith that the jury will endeavor to follow the court's instructions, our system of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice.

Id., 352 U.S. at 242. Furthermore, a defendant "is entitled to an instruction as to any recognized defense *for which there exists evidence sufficient for a reasonable jury to find in his favor.*" Mathews v. United States, 485 U.S. 58, 63 (1988) (emphasis supplied).

As noted by the Wyoming Supreme Court, Strickland's theory of the case was "abundantly" clear, meaning that an instruction on this theory should have been issued, or at the very least requested by counsel. However, for some unexplainable reason, counsel failed to request jury instructions that would have allowed the jury to consider Strickland's theory of the defense.

The district court denied relief upon the claim that counsel was ineffective in failing to request proper jury instructions regarding Strickland's theory of defense or an alibi defense. The district court merely noted that Strickland failed to establish how proper jury instructions would have changed the mind of the jury. However, as argued in his § 2254 motion, Strickland again notes that without any instruction regarding the elements of Strickland's defense, the jury had no choice but to find Strickland guilty. After all, either the case occurred as portrayed by Strickland or as portrayed by the State. Without any instruction to support Strickland's theory of the case, the jury was only left with instructions regarding the State's theory of the case, resulting in an improper conviction.

Accordingly, because Strickland was denied effective assistance of counsel, this court should vacate Strickland's convictions.

D. Strickland's Rights to a Fair Trial and to Due Process of Law Were Violated When He Was When the Prosecution Engaged in Prejudicial Misconduct.

Strickland's Sixth Amendment right to a fair trial and Fifth and Fourteenth Amendment rights to due process of law were violated by acts of prosecutorial misconduct throughout the proceedings. The prosecution introduced evidence at trial that had already been ruled inadmissible as being too prejudicial prior to trial. Furthermore, the prosecution verbally attacked and insulted defense counsel.

In evaluating due process claims, this court inquires whether the practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105,(1934). As stated by Justice Frankfurter, due process:

> embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the deepest notions of what is fair and right and just.

Solesbee v. Balkcom, 339 U.S. 9, 16 (1950).

The rule is well established that the government may prosecute with earnest and vigor. Berger v. United States, 295 U.S. 78, 88 (1935). But, the Supreme Court has held that "while [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones." Id. "It is as much [the prosecutors] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Id. A prosecutor is more that an advocate; she or he is a representative of the sovereign, and in that capacity, is expected to exercise restraint and to be fair to all. United States v. Pinto, 850 F.2d 927, 938 (2d Cir. 1988). It is important that prosecutors in our system exercise restraint because what they say in front

of a jury carries great weight. "Arguments delivered while wrapped in the cloak of state authority have a heightened impact on the jury. For this reason misconduct by the prosecutor, normally an elected official, must be scrutinized carefully." Berger.

The United States Supreme Court has stated that a defendant's due process rights are violated when the prosecutor's misconduct renders a trial "fundamentally unfair." Darden v. Wainwright, 477 U.S. 168, 181 (1986). In ascertaining whether a prosecutor's remarks constitute a denial of due process the court should determine if a prosecutor's remarks misstate or manipulates the evidence. Darden, 477 U.S. at 182. Furthermore, the overall weight of the evidence of guilt should be considered in determining the denial of due process. United States v. Young, 470 U.S. 1, 19 (1985). Whether the misconduct relates to a critical part of the case is also considered in determining denial of a fair trial. Giglio v. United States, 405 U.S. 150, 154 (1972). Likewise, it is necessary to review the entire proceedings and place the prosecutor's remarks in context. Greer v. Miller, 483 U.S. 756, 765-66 (1987). However, if a trial court issues a curative instruction it is assumed that the jury will follow the instruction and disregard any improper statements by the prosecutor. Id.

"To make statements which will not or cannot be supported by proof is, if it relates to significant elements of the case, prosecutorial misconduct. Moreover, it is fundamentally unfair to an opposing party to allow an attorney, with the standing and prestige inherent in being an officer of the court, to present to the jury not susceptible to proof but intended to influence the jury in reaching a verdict." United States v. Dinitz, 96 S.Ct. 1075, 1082 (1976). "Thus, an improper opening statement is often sufficient ground to

declare a mistrial." Arizona v. Washington, 98 S.Ct. 824 (1978)).

In the instant case, Strickland's due process rights were violated when the prosecution engaged in prejudicial misconduct. The prosecution offered evidence at Strickland's trial regarding prior bad acts by Strickland that had been ruled inadmissible prior to trial. The court ruled that any mention of Strickland treatment at the Wyoming Behavioral Institute was prohibited. Strickland v. Wyoming, 2004 WY 91 (Wy. 2004). However, in direct violation of the court's order, the prosecution made mention of Strickland's mental illness at trial, raising the issue under the cloak of testing Strickland's assertion that he was not competent to proceed in his civil action. Id . The trial court ruled such evidence inadmissible, except in any situation where Strickland's memory of a past event did not conform to the State's theory, which was naturally the crux of the trial.

Additionally, although the state did not disclose or give notice that it would introduce additional prior bad act evidence, such as Strickland's failure to pay the full balance of a hotel bill or that someone filed a lien on Strickland's residence, the prosecution introduced such evidence. Specifically, evidence of a motel bill that Strickland "skipped out" on paying was introduced. Further, the state introduced evidence that a lien was possessed against Strickland residence, thereby constituting non-prejudicial prosecutorial misconduct. The prosecution was also sure to raise the fact that Strickland had filed a civil suit against those that had sold him the residence at issue, claiming that the residence was structurally flawed. All of this evidence was introduced by the state despite assurances during pre-trial that such evidence would not be raised at trial.

The rule prohibiting introduction of such evidence, Rule 404(b) of the Wyoming Rules of Evidence which is modeled

after the federal rules, serves to prevent the inference that an individual acted in conformity with "other" actions with the same criminal character. Weissenberger, Federal Rules of Evidence, 404 (1999). The evidence of the extrinsic act is excluded because:

> it is thought that the jury might punish an individual for discrete conduct rather than weighing only the direct evidence of the charged crime. . . Extrinsic act evidence is excluded not because it has no appreciable value, but because it has too much. The natural and inevitable tendency of the tribunal - whether judge or jury - is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take proof of it as justifying a condemnation irrespective of guilt of the present charge. . .General bad character, much less general bad reputation, has not yet become a criminal offense in our scheme.

Id. This rule was blatantly violated in the instant case over and over by the prosecution.

Despite these safeguards enacted to protect Strickland's right to a fair trial, the prosecution brazenly stepped over these evidentiary boundaries to insure that Strickland would be convicted whether guilty of the charged crimes or not. The pros ution, far from seeking justice, was greedily seeking a conviction in the instant matter no matter what the cost and regardless of the guilt or innocence of the one accused. The prosecution went so far as to improperly assert that defense counsel could not refute the State's presentation of the facts of the instant case because defense counsel had never investigated a fire nor worked a fire crime scene. The Wyoming Supreme Court found such to be non-prejudicial prosecutorial misconduct.

Strickland asserts that, taken cumulatively with the aforementioned instances of prosecutorial misconduct, it is clear that Strickland was denied his rights to due process of law and a fair trial. Strickland further notes that such misconduct utilized evidence not in the record, making it appear as if the prosecution was privy to information and facts not available to the defense, casting doubt on Strickland's defense on issues not supported by the facts. Such prejudicial misconduct rendered Strickland's trial nothing more than a dog and pony show, set up by the prosecution to insure a conviction. The prosecution's behavior was inexcusable, un-American, and reminiscent of the type of abuses of power occurring in third world countries. Deliberate misconduct and abuses by state prosecutors should not be ignored by this Court. In this instance, the state's misconduct resulted in a total miscarriage of justice and cannot be allowed to stand.

Regarding Strickland's claim of due process and fair trial violations, the district court noted that the prosecution engaged in misconduct. However, such misconduct did not rise to the level of denying Strickland a fair trial. The district court noted that instructions were given from the bench to disregard the improper and prejudicial introduction of evidence made by the prosecution. However, one must wonder how a juror is simply to disregard evidence suggesting that Strickland had a criminal past or a history of mental illness, as such tends to establish in the minds of the jurors the notion that Strickland committed the instant crime. Hence, the reason the evidence at issue was ruled inadmissible prior to trial.

As the district court erred in stating that Strickland's rights to a fair trial and due process of law were not violated, Strickland's convictions must be overturned.

E. Strickland Made a Substantial Showing of the Denial of His Rights under the Fourth, Fifth, Sixth and

Fourteenth Amendments to the United States Constitution and Certificate of Appealability Should have Been Granted on Each of the Issues Above.

Because Strickland made a substantial showing of the denial of his constitutional rights, including his Fourth, Fifth, Sixth and Fourteenth Amendment rights, which directly led to denials of his right to a fair trial and the conviction of an innocent man, and because the district court's determinations rejecting relief were much more than debatable, at minimum certificate of appealability should have been granted on all of the above issues. See Miller-El v. Cockrell, 123 S.Ct. 1029, 1039, 1045 (2003).

Strickland's right to be free from double jeopardy was violated when he was convicted of two different arson statutes that required the exact same proof on the same elements of the crimes. Furthermore, even if the statutes at issue vary in some manner, the lower courts failed to grant relief upon the fact that the same acts erroneously formed the basis for multiple punishments.

Strickland's right to be free from unreasonable searches and seizures was violated when law enforcement and fire officials worked together to mislead Strickland into signing a consent form to search his residence, informing Strickland that a search was being made for the cause of the fire. In reality, law enforcement officials were searching for evidence to be used against Strickland for an arson charge. Such misinformation permitted law enforcement officials to avoid obtaining a search warrant based upon probable cause, which was necessary in this case.

Strickland's right to effective assistance of counsel was violated when counsel failed to conduct adequate pre-trial investigation, leading counsel to fail to present an expert witness on behalf of Strickland. Counsel also failed to request

jury instructions that would have allowed the jury to lend credence to Strickland's theory of defense, resulting in a conviction that the jury was forced to return almost by default. Therefore, counsel's actions amounted to ineffective assistance of counsel that prejudiced Strickland.

Finally, Strickland's Sixth Amendment right to a fair trial and Fifth Amendment right to due process of law were violated based upon the improper actions of the prosecution in this matter. The State introduced evidence of prior bad acts and evidence of Strickland's mental health issues despite the fact that such acts had previously been ruled inadmissible. The prosecution also made improper personal attacks against defense counsel.

In response to these claims, the district court concluded that the issues presented were without the requisite merit necessary to permit relief. The district court's decision was not just debatable – it was wrong. Standing individually, the above errors and are significant and demonstrate a substantial showing of the denial of Strickland's constitutional rights. However, when viewed under a totality of the circumstances approach, these errors combine and present an overwhelming showing that Strickland's constitutional rights were violated. Thus, the refusal to grant certificate of appealability was clearly an error.

IX. Conclusion

Because the state court proceedings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law and resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court, Strickland's petition for habeas corpus relief under 28 U.S.C. § 2254 should have been granted, meaning that Strickland's convictions must be overturned.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 05-8062
(D.C. No. 04-CV-330-J) (D. Wyo.)

[Filed September 20, 2005]

FLOYD STRICKLAND,	)
	)
Petitioner - Appellant,	)
v.	)
	)
SCOTT ABBOTT, Warden,	)
Wyoming State Penitentiary,	)
	)
Respondent - Appellee.	)
	)

ORDER AND JUDGMENT*

* After examining appellant's brief and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2) and 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This Order and Judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms

Before **HARTZ**, **EBEL**, and **TYMKOVICH**, Circuit Judges.

Floyd Strickland was convicted in Wyoming state court of two counts of arson. The district court denied both Mr. Strickland's 28 U.S.C. § 2254 petition for a writ of habeas corpus and his request for a certificate of appealability ("COA") to appeal the denial of his § 2254 petition. He now seeks a COA from this court. For substantially the same reasons set forth by the district court, we DENY a COA and DISMISS this appeal.

In June 2001, Mr. Strickland was convicted of both first- and second-degree arson in relation to a fire that damaged the basement of his home. *See* Wyo. Stat. Ann. §§ 6-3-101, -102 (2005). He was sentenced to serve concurrent terms of between 120 and 216 months on the count of first-degree arson and between 60 and 108 months on the count of second-degree arson. On direct appeal, Mr. Strickland asserted thirteen points of error, but the Wyoming Supreme Court affirmed his conviction and sentence. *Strickland v. State*, 94 P.3d 1034 (Wyo. 2004).[1]

Mr. Strickland then filed a *pro se* 28 U.S.C. § 2254 petition in federal district court, asserting that the Wyoming Supreme Court's decision is contrary to, or involved the unreasonable application of, United States Supreme Court

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and conditions of 10th Cir. R. 36.3.

[1] Although the original sentence also recommended that Strickland not be allowed to return to Natrona County should he be released prior to full service of his sentence, the Wyoming Supreme Court found that portion of the sentence to be unlawful. *Strickland*, 94 F.3d at 1050–51.

case law.[2] Mr. Strickland asserted causes for relief based on: his Fifth Amendment right against double jeopardy, his Fourth Amendment rights, his Sixth Amendment right to effective counsel, and his Fifth and Sixth Amendment rights to due process and a fair trial.

Applying the standard given in § 2254, the district court denied relief on all four grounds. It first concluded that the Wyoming Supreme Court did not unreasonably deny Mr. Strickland's double jeopardy claim because, in Wyoming, first- and second-degree arson each "require[] proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Second, the district court rejected Mr. Strickland's Fourth Amendment claims, both because he had the opportunity to fully and fairly litigate the issue in the Wyoming courts and because the Wyoming Supreme Court's conclusion that Mr. Strickland had consented to all the challenged searches was not unreasonable. Third, the district court rejected Mr. Strickland's claim that his attorney was ineffective in failing to call an expert witness and failing to request several jury instructions. Finally, the district court concluded that statements made by the prosecutor did not rise to the level of a violation of Mr. Strickland's right to a fair trial. Mr. Strickland sought to appeal the district court's

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[2] The standard for federal habeas review is set out in § 2254:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

28 U.S.C. § 2254(d).

decision, and the district court denied his request for a COA. He renews his request for a COA before this court.

Congress has mandated that a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). We have held that a petitioner "can make such a showing by demonstrating that the issues he seeks to raise on appeal are deserving of further proceedings, subject to a different resolution on appeal, or reasonably debatable among jurists of reason." *Montez v. McKinna*, 208 F.3d 862, 869 (10th Cir. 2000). In this case, Mr. Strickland has not made such a showing. Therefore, for substantially the same reasons set forth in the district court's thorough opinion, we DENY Mr. Strickland's request for a COA and DISMISS this appeal.

ENTERED FOR THE COURT

/s/
David M. Ebel
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Case No. 04-CV-330-J

[Filed September 20, 2005]

FLOYD STRICKLAND,	)
	)
Petitioner,	)
	)
v.	)
	)
SCOTT ABBOTT, Warden, Wyoming State Penitentiary,	)
	)
Respondent.	)
	)

ORDER DENYING CERTIFICATE OF APPEALABILITY

The above-entitled matter comes before the Court upon Petitioner Strickland's *pro se* notice of appeal and request for certificate of appealability. After careful consideration of petitioner's request and being otherwise fully advised in the premises, the Court FINDS and ORDERS as follows:

On June 15, 2005, this Court denied a petition for a writ of habeas corpus filed by petitioner Strickland pursuant to 28

U.S.C. § 2254. Four major grounds for relief were considered, and each was ultimately rejected. As to petitioner's initial Fifth Amendment argument, the Court held that because each arson statute in question--Wyo. Stat. Ann. § 6-3101(a) and Wyo. Stat. Ann. § 6-3-102(a) (2005)--- required the proving of an element not contained in the other, petitioner's separate convictions for first and second degree arson, and their concomitant sentences, did not violate the Double Jeopardy Clause of the Fifth Amendment. Second, this Court did not allow petitioner to collaterally attack the Fourth Amendment determination of the Wyoming Supreme Court, finding instead that the warrantless search of petitioner's residence was consensual. Third, this Court also denied petitioner's ineffective assistance of counsel claim, noting that counsel's failure to call an expert to counter the State's theory of cause and failure to request certain jury instructions did not amount to a deficient performance or result in prejudice under *Strickland v. Washington,* 466 U.S. 668 (1984). Finally, the Court rejected petitioner's fair trial arguments under the Sixth and Fourteenth Amendments, finding that petitioner failed to show that the alleged prosecutorial misconduct fundamentally altered the jury's ability to render a fair and impartial verdict.

A state prisoner whose petition for habeas corpus is denied may not appeal that decision unless a federal court issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A). A certificate of appealability may issue under § 2253 if, and only if, "the applicant has made a substantial showing of the denial of a constitutional fight." *Id.* § 2253(c)(2). Section 2253 gives this Court two choices: (1) issue a certificate of appealability indicating which issues, if any, satisfy the required showing, or (2) state the reasons why such a certificate should not issue. *Id.* § 2253(c)(3). For the foregoing reasons, and for the reasons set forth in this Court's

June 15, 2005 Order denying petitioner's § 2254 motion, the Court finds that the petitioner cannot make a substantial showing of the denial of a constitutional right and accordingly, a certificate of appealability should not issue in this action.

Therefore, and for the foregoing reasons, it is hereby

ORDERED that petitioner Floyd Strickland's Request for Certificate of Appealability shall be, and now is, **DENIED**.

Dated this 20th day of September, 2005.

/s/
ALAN B. JOHNSON
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Case No. 04-CV-330-J

[Filed June 15, 2005]

FLOYD STRICKLAND,	)
	)
Petitioner,	)
	)
v.	)
	)
SCOTT ABBOTT, Warden	)
Wyoming State Penitentiary,	)
	)
Respondent.	)
	)

MEMORANDUM ORDER AND OPINION
DENYING PETITIONER RELIEF
PURSUANT TO 28 U.S.C. § 2254

The above-entitled matter came before the Court upon a petition for a writ of habeas corpus. The Court has considered the petition and all the material in the file and finds:

FACTUAL AND PROCEDURAL BACKGROUND

The Wyoming Supreme Court detailed the factual background in this case on Petitioner's direct appeal. *See Strickland v. State of Wyoming,* 94 P.3d 1034 (Wyo. 2004). In the interest of providing a complete record, the Court will now recite the Wyoming Supreme Court's factual findings:

> [P3] Strickland returned to Casper after a family vacation on Saturday, June 17, 2000, and discovered that his home had been damaged by fire during his absence. Police Officer Richard Brown was dispatched in response to Strickland's 911 telephone call. Strickland told Officer Brown he had already looked inside the house and could hear water running and smell a burning odor. Officer Brown testified that, in response to a question about the cause of the fire, Strickland related that he had filed a lawsuit and had alienated a number of people. However, Strickland also indicated that the cause could have been a broken water pipe because the house was in bad shape. When Strickland informed Officer Brown that he had found a door into the garage unlocked and partially open, Officer Brown examined the door knob and the door frame closely and carefully, using his flashlight, and did not observe any latent finger prints or indications that it had been pried open. However, a few days later a fellow police officer showed Officer Brown a piece of the door frame that he had taken from the scene on June 18, and it had what appeared to be fresh pry marks on it. Officer Brown was certain that had the marks been there the night he was there, he would have noticed them, because that is precisely what he was looking for. Strickland told Officer Brown that all the doors to his home were secured when he left, that

he was the last person out of the house, and that no one else had a key. Strickland also directed Officer Brown's attention to a sliding glass door to the kitchen that was ajar, but Officer Brown did not detect any signs that the door had been forced open. Strickland told Officer Brown that nothing was missing from the house, but that the contents of the basement, where most of the damage from fire and running water occurred, were worth over $30,000. Officer Brown did not smell smoke in the house, though Strickland pointed out soot on the walls in the kitchen to him.

[P4] The electricity to the house was still on, and there was water running from a broken pipe in the basement, so Officer Brown called the service providers and had them shut off the power and water. Officer Brown waited at the house for the utilities to be shut off, and Strickland left with his family to go to a motel. Officer Brown told Strickland that an evidence technician would be there the following day to continue the investigation. Although Officer Brown made no determination of the cause of the fire that night, he related that Strickland knew that criminal activity was possibly involved and that an investigation into it would continue.

[P5] Police Officer Michael Concepcion is the evidence technician who was assigned to further investigate Strickland's report of the fire in his home. He arrived at the scene about 6:00 p. m. on June 18, and Strickland unlocked the front door and admitted him into the home. Strickland directed Officer Concepcion's attention to a garage door that had pry marks on it as well as a screwdriver that Strickland said did not belong to him. Officer Concepcion

testified the pry marks appeared to have been made recently. Strickland told Officer Concepcion that he had pointed out the pry marks and the screwdriver to Officer Brown. [ ] The doorjamb itself was cut out and preserved as evidence. Officer Concepcion opined that the pry marks on the doorjamb could have been made by the screwdriver Strickland identified as not belonging to him. Officer Concepcion also noticed a plastic gas can near the door from the garage into the residence. The gas can was open and the air valve on the back was raised. Officer Concepcion then continued his portion of the investigation by taking photographs throughout the house. When asked about suspects, Strickland identified the previous owner of the house and some real estate agents as possible suspects. Strickland also made a written list of those suspects as follows: Roger and Fred Stratton; Victoria M. Lowe; Harry Willis; Michael K. Ward; Sandra Erickson; and John Logan. Officer Concepcion found footprints in the soot on the kitchen floor. Strickland thought they were probably made by him or Officer Brown. The final part of Officer Concepcion's work was done in the basement of the house, and after he observed and photographed that area, he called his supervisor to request that a fire inspector be sent to the scene. Strickland asked Officer Concepcion several times if he thought the fire was caused by arson. Officer Concepcion asked Strickland if anything was missing from the house, and Strickland replied that nothing was missing, but that he takes his personal belongings with him on vacation. Officer Concepcion noticed the house was kind of "sparse," not much hanging on the walls or on top of dressers.

[P6] Harold Morrow, a trained and experienced fire/arson investigator, was dispatched to the Strickland residence late in the afternoon of June 18, 2000. Officer Concepcion was already at the scene, as was Strickland. Morrow obtained permission from Strickland to enter the home, and Officer Concepcion led Morrow to the basement. Morrow photographed the fire scene and made a diagram of the entire basement. Morrow was able to identify the origin of the fire in a small utility closet where the water heater was located. Morrow took note that the water heater was an electric appliance, and although he had seen instances where gas water heaters had caused a fire, he had not seen that with electric ones. Because Morrow had less experience with a fire situation such as this one, he called in Fire Chief Rich Carpenter to continue the investigation. Morrow visited with Strickland while they waited for Carpenter to arrive. During that conversation Morrow became aware of Strickland's dispute over the house and the lawsuit with the previous owner and the realtor involved in the sale of the house. He also noticed pry marks on the garage door as Strickland showed him around.

[P7] Not long after Carpenter arrived, he ascertained that the fire had been deliberately set. Morrow then brought in evidence cans and obtained a consent to search from Strickland. In the area of the water heater, beneath fire debris, Carpenter found partially burned newspaper, a metal food rack, candle drippings, a gasoline soaked magazine, and the presence of newspapers stuffed behind the water heater. In addition, the sheet rock wall behind the water heater had been punctured in three areas in what could have been an attempt to spread the fire through

the fire resistant sheet rock and into the wall structure. It was also evident that the fire had become hot enough to melt a solder joint in a hot water line, causing a breach in that line. The escaping water had extinguished the fire. The water continued to build up in the basement until it reached the level of the toilet and bathtub, and after that it leveled off at about two feet as water drained out through the toilet and tub. A mass of candle wax that Carpenter believed was from the fire area had floated all the way to the bathroom and settled on the floor near the toilet. The candle appeared to have been one of significant size. The fire was actually caused by the lit candle, which burned down until it lit the fumes from the gasoline soaked magazine and ignited the newspaper. Morrow informed Strickland of the results of the investigation and that the evidence established that the fire was an arson. Strickland reacted calmly to that news. Had the fire not been extinguished by the broken water line, the fire had the potential to have destroyed the house.

[P8] Derrick Diem, a detective for the Casper Police Department, became involved in this matter on June 18, 2000, when he was called to the scene by Officer Concepcion. Immediately upon his arrival, and before any other words were exchanged, Strickland asked Officer Dietz if he was a suspect in the fire. Officer Dietz responded that he did not know. While Officer Dietz attempted to survey the scene, Strickland followed him around, to some extent interfering with his ability to investigate. In addition, Strickland volunteered a lot of information about the fact that he was away from home when the fire started, and that he had worked as a plumber and knew better than to start a fire near the water heater because be knew it would

melt the water pipes and extinguish the fire. Officer Dietz also noticed that the walls were sparsely decorated and things appeared to be missing from the walls and closets. In order to facilitate the investigation process, Officer Dietz asked Strickland to come to the police station and talk with him. Strickland met Officer Dietz at the police station about forty minutes later. He traveled there in his own car. When Officer Dietz confronted Strickland with the suspicious nature of the evidence the police were finding, Strickland became angry and left. Officer Dietz also reviewed an examination under oath given by Strickland, which served as a comparison with what the various police officers had testified to, pointing out some inconsistencies and inaccuracies in that examination.

[P9] Officer Dietz also testified that he found out that Strickland had a business office in Casper. Officer Dietz obtained a search warrant for that office and conducted a search. A lot of personal possessions not associated with the business were found boxed up in the office. It was readily apparent that some of those things had been through the fire (were sooty, smelled of smoke), and some had not been through the fire. The items that had not been through the fire were family photographs and keepsakes, valuables, firearms, financial records, important pieces of mail that were addressed to the Strickland's home address prior to the fire, etc., that could have been stored there to prevent them from being destroyed in a fire.

[P10] Strickland's home was insured by Allied Insurance. The policy covered the cost to replace/repair the home (which could include costs

that exceeded the home's face value of about $159,500), as well as replacement contents coverage of $111,650. Strickland and his wife were the insureds and any recovery by them would have been barred if the damage had been intentionally caused by either one of them. However, the mortgage holder was also a beneficiary of the insurance policy, irrespective of the cause of the fire. A claim submitted to the insurance company by Strickland in 1999 was denied because the damage, caused by settlement/earth movement, was not covered by the policy or was a preexisting problem with the home predating his policy. Strickland reported the fire damage that is the subject of this case to the insurance company on the morning of June 17, 2000. The insurance company completed a routine investigation of the claim, and it also hired an expert to conduct a "cause and origin" investigation of the fire. The insurance company made an initial payment of $ 2,500 to Strickland for living expenses on June 21, 2000. Eventually, Strickland submitted loss claims of about $140,000. After completing its investigation, the insurance company denied the claim and voided the policy. However, Wells Fargo, the mortgagor, was paid approximately $54,000 for the loss of its value in the house.

[P11] Strickland's insurer retained David Harvey to conduct a cause and origin investigation of the fire. Harvey considered it unusual that Strickland's first reaction to his presence was to volunteer a detailed alibi of why he could not have set the fire. Strickland told Harvey that nothing about the house had changed, nothing had been brought in or taken out, except for things taken by the police and fire investigators. The only thing Strickland noted was that a can of Coleman

camp fuel may have been missing from the garage. [] Harvey's investigation detected that a considerable amount of stuff had been brought into the house after the fire, and that many things also appeared to have been removed prior to the fire. Harvey was afforded access to the evidence collected by the police, as well as having the results of his own investigation and testing. Harvey also concluded the fire was an arson.

[P12] Sandra Erickson, the previous owner of Strickland's home, testified that she sold the house to Strickland for $110,000, and that he sued her because he alleged there were defects in the home that she had not disclosed. She denied knowledge of any defects and testified that the lawsuit against her had been dismissed prior to the fire. She also denied possessing a key to the house, giving anyone else a key to the house, or having anything to do with the fire. The testimony of one of Strickland's neighbors suggested that, prior to the fire, he had compounded his problems with the value of the home by advertising it for sale for $475,000 and listing his grievances about the home's condition and the performance of the real estate agency. Fred Stratton testified that he sold the house at issue to Strickland, and Strickland had filed suit against his real estate firm, one of his agents, the home inspector, structural engineer, and the previous owner of the house. Stratton related that he offered to settle the suit for $10,000, which he thought was a fair amount to repair and paint what he viewed as "cosmetic" flaws in the foundation and walls of the house. Strickland wanted in excess of $100,000 to settle the suit. The lawsuit was eventually dismissed, and Stratton knew before the fire that it was going to be dismissed. Stratton denied having set the fire or

knowing anyone that had anything to do with it. Harry Willis, a home inspector who inspected Strickland's home prior to his purchase, testified that Strickland sued him and that he was always confident he would be vindicated, and that he had done nothing wrong in the course of performing his inspection. He inspected the house a second time after Strickland complained. He did find some new cracking in walls but considered them to be "cosmetic." He also confirmed that the lawsuit against him was dismissed and that he had nothing to do with the fire.

[P13] Strickland testified in his own behalf, and cross-examination by the prosecutor revealed that he was having some financial problems prior to the fire as well as that he had provided false or inaccurate information on his application to become a real estate broker (that he had a college degree) and on a credit card application (that his real estate company had anticipated sales of one million dollars - in reality his fledgling company had no sales). Strickland also testified on cross-examination that he reported a couple of backpacks and a sleeping bag as missing from his basement, and that in the backpacks were camp candles designed to be "ten-hour candles."

[P14] On January 11, 2001, an information was filed in the Circuit Court of the Seventh Judicial District charging Strickland with one count of first degree arson [Wyo. Stat. § 6-3-101] and one count of second degree arson [Wyo. Stat. § 6-3-102].

Strickland, 94 P.3d at 1040-1043 (footnotes omitted).

Strickland pled not-guilty to all the counts in the information and in June 2001 a jury trial was held in the Seventh Judicial District of Wyoming, Natrona County. The jury returned a guilty verdict on both counts. Strickland was sentenced to serve not less than 120, but not more than 216 months on the first count of first-degree arson, and not less than 60 months but no more than 108 months for second degree arson; the state district court ruled the sentences to run concurrently. The district court also requested that if Strickland was released prior to his full service of sentence, that he not be allowed to return to Natrona County, Wyoming. *Strickland,* 94 P.3d at 1050-1051.

Strickland filed a timely motion for a new trial arguing that his rights under the Fourth Amendment to the United States Constitution were violated when his property was searched without a warrant and without his consent. Strickland further argued that the state prosecutor had engaged in prosecutorial misconduct by failing to disclose exculpatory evidence related to Strickland's financial situation at the time of the alleged arson. Moreover, Strickland argued that he was denied effective assistance of counsel in violation of his Sixth Amendment rights, arguing that his counsel: (1) failed to properly investigate and call defense experts; (2) failed to submit an alibi defense, or request an alibi jury instruction; and (3) failed to request an instruction detailing specific intent. The district court denied both Strickland's motion for new trial and his subsequent motion for reconsideration. Strickland took an appeal to the Wyoming Supreme Court.

In his appeal to the Wyoming Supreme Court, Strickland raised thirteen issues.[1]

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[1] The Wyoming Supreme Court detailed these issues as following:

I. Whether there was sufficient evidence to convict Strickland of first-degree arson?

II. Did Strickland's counsel fail to provide effective assistance of counsel by not calling an expert witness to testify at trial, or by not submitting jury instructions on alibi or specific intent?

III. Did omission of the words "towards another" in the jury instruction defining "maliciously" constitute error?

IV. Did the district court sufficiently instruct the jury on the specific intent element of both first-degree arson and second-degree arson?

V. Did the district court err when it did not appoint substitute counsel for Strickland?

VI. Did the district court err when it denied Strickland's motion to suppress evidence?

VII. Did the district court err when it admitted into evidence the written report of arson investigator Harry Morrow?

VIII. In sentencing Strickland, did the district court unlawfully banish him from Natrona County?

IX. Was cumulative error committed?

X. Was Strickland's right against double jeopardy violated when he was convicted and sentenced for both first-degree arson and second-degree arson?

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On July 30, 2004, the Wyoming Supreme Court issued an opinion affirming Strickland's convictions. Notably, the Wyoming Supreme Court found that the prosecutor had engaged in misconduct, however, the court found that the misconduct was harmless error. *Id.* at 1052-1054. Additionally, the court found that the district court's recommendation to banish Strickland from Natrona County was unlawful, and remanded the case back for re-sentencing, *Id.* at 1050-1051.

On November 24, 2004, the Petitioner filed a pro-se petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 in the District Court for the District of Wyoming. The Petitioner asserts four causes for habeas corpus relief before the Court: (1) The Wyoming Supreme Court's decision that his Fifth Amendment right against double jeopardy was not violated is contrary to, or involved the unreasonable

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> XI. Whether Strickland's convictions for first-degree arson and second-degree arson cannot stand because the two crimes are mutually exclusive and punishment for both crimes violates Strickland's right to be free from double jeopardy?
>
> ***
>
> XII. Whether the State of Wyoming's repeated introduction of impermissible 404(b) evidence and other conduct constituted prosecutorial misconduct and such misconduct prejudiced a substantial right of [Strickland] and denied his right to a fair trial?
>
> XIII. Whether in light of all the circumstances, trial counsel's acts or omissions were outside the wide range of professionally competent assistance and prejudiced [Strickland] so that the adversarial process was compromised and the trial did not reach a just result?

Strickland v. State of Wyoming, 94 P.3d 1034, 1039 (Wyo. 2004).

application of Supreme Court case law; (2) The Wyoming Supreme Court's decision that his Fourth Amendment rights were not violated is contrary to, or involved the unreasonable application of Supreme Court case law; (3) The Wyoming Supreme Court's decision that his Sixth Amendment rights to effective assistance of counsel was not violated is contrary to, or involved the unreasonable application of Supreme Court case law; and (4) The Wyoming Supreme Court's decision that his Fifth Amendment right to due process of law and Sixth Amendment right to a fair trial were not violated is contrary to, or involved the unreasonable application of Supreme Court case law. For the reasons set forth below, the Court denies Petitioner's request for relief pursuant to 28 U.S.C. § 2254.

STANDARD OF REVIEW

A petition for federal habeas corpus relief from a state conviction is governed by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254, which provides, in pertinent part:

> [A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a) (2005).

The standard by which a state conviction is reviewed was enumerated by Congress, which provided that a federal court shall not grant a state prisoner habeas corpus relief with respect to any claim that was adjudicated on the merits in the state court unless:

> the adjudication of the claim—
> (l) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1-2).

The Tenth Circuit Court of Appeals has recently held:

> Under [28 U.S.C. § 2254(d)(1)], we grant relief only if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Court] has on a set of materially indistinguishable facts. Under the [28 U.S.C. § 2254(d)(2)], relief is provided only if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case. Thus we may not issue a habeas writ simply because we conclude in our independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Gipson v. Jordan, 376 F.3d 1193, 1196 (10th Cir. 2004)(citations and quotation marks omitted).

Moreover, a determination of a factual issue made by a state court shall be presumed to be correct, and the petitioner has the burden of rebutting the presumption of correctness by

clear and convincing evidence. 28 U.S.C. § 2254(e)(1). With this standard in mind, we now turn to the merits of the petition.

DISCUSSION

A. Double Jeopardy

Strickland first attacks the Wyoming Supreme Court's determination that his convictions for both first and second degree arson violated his right to be free from double jeopardy in violation of the Fifth Amendment of the United States Constitution. Specifically, Strickland argues that his convictions represent the imposition of multiple criminal punishments for the same offense. Strickland asserts that the sentences he received clearly demonstrate that he was punished for the same criminal conduct twice in violation of the double jeopardy clause found in the Fifth Amendment and Supreme Court precedent. Strickland concedes that the Wyoming Supreme Court applied the correct precedent, namely *Blockburger v. United States,* 284 U.S. 299 (1932), however, Strickland argues that its application by that court was unreasonable and contrary to established federal law.

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "no person...shall...be subject for the same offence to be twice put in jeopardy of life and limb[.]" In *Blockburger,* the Supreme Court crafted a test to determine whether a person has been subjected to double jeopardy, stating:

> The applicable rule is that where the same act of transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one,

> is whether each provision requires proof of a fact which the other does not.

Id. at 304.

In Wyoming, first degree arson is defined by Wyoming Statute § 6-3-10, which provides, in pertinent part:

> (a) A person is guilty of first-degree arson if he maliciously starts a fire or causes an explosion with intent to destroy or damage an occupied structure.
>
> (b) First-degree arson is a felony punishable by:
>
> (i) Imprisonment for not more than twenty (20) years;
>
> (ii) A fine of not more than the greater of twenty thousand dollars ($20,000.00) or two (2) times the face amount of the insurance if the fire was started to cause collection of insurance for the loss; or
>
> (iii) Both fine and imprisonment.

Arson in the second degree is defined in Wyoming by Wyoming Statute § 6-3-102, which provides, in pertinent part:

> (a) A person is guilty of second-degree arson if he starts a fire or causes an explosion with intent to destroy or damage any property to cause collection of insurance for the loss.
>
> (b) Second-degree arson is a felony punishable by imprisonment for not more than ten (10) years, a fine

of not more than two (2) times the face amount of the insurance, or both.

When deciding this issue the Wyoming Supreme Court recited the appropriate test and then compared the two statutes in question. The court determined that double jeopardy was not implicated when Strickland was convicted and sentenced for both first and second degree arson, writing: "It is clear upon cursory examination that each [offense] has an element that distinguishes it from the other. First-degree arson protects potential victims where an inhabited structure is set afire. Second-degree arson vindicates victims of insurance fraud." *Strickland,* 94 P.3d at 1051. The court then addressed Strickland's second argument:

> [P41] Strickland also relies on Wyo. Stat. Ann. § 6-3-101(b)(ii) (LexisNexis 2003), which provides that one penalty for first-degree arson is: "A fine of not more than the greater of twenty thousand dollars ($20,000.00) or two (2) times the face amount of insurance if the fire was started to cause collection of insurance for the loss." We must, of course, evaluate these statutes as a whole, and we agree with the State that section would only affect punishment.
>
> [P42] Strickland contends that he was, in essence, tried twice for the same crime and that he is punished twice for the same crime. We conclude, as have other jurisdictions, that Strickland was properly tried, convicted, and punished for both first-degree and second-degree arson. *Land v. State,* 802 N.E.2d 45, 51-52 (Ind. App. 2004) (no double jeopardy violation where defendant convicted of class B felony (arson damage to neighbor's residence) and class D felony (arson damage to his estranged wife's personal

> property)); *State v. Woodson,* 227 Conn. 1, 629 A.2d 386, 392 (Conn. 1993) ("The obvious purpose subsection (a)(3) [of the arson statute] is to prevent and punish fraud against the fire insurance industry, fraud for which the public pays in the long run. In contrast, the purpose of subsection (a)(4) is to protect the life and limb of those public servants charged with the dangerous duty of fighting fires."); *and see Belser v. State,* 727 N.E.2d 457, 460-61 (Ind. App. 2000) (defendant properly convicted of both arson causing damage to person's dwelling without that person's consent, and arson endangering human life); *People v. Walker,* 234 Mich. App. 299, 593 N.W.2d 673,678-79 (Mich. App. 1999) (statutes punishing destruction of property of another by any means, and burning any personal property whether owned by himself or another, protect distinct societal norms); *People v. Ayers,* 213 Mich. App. 708, 540 N.W.2d 791,797 (Mich. App. 1995) (convictions for arson of dwelling and for burning insured property did not violate double jeopardy).
>
> [P43] Strickland's double jeopardy fights were not violated.

Id. at 1052.

While the Wyoming Supreme Court's discussion regarding the application of *Blockburger* is sparse, we do not feel that the court's overall disposition on the issue can be characterized as contrary to clear federal law, or, *a fortiori,* unreasonable.

The most efficient way to determine whether the Petitioner has been punished twice for the same offense is to ask

whether the two statutes in question may be implicated independently without triggering the other. In the case of first degree arson, the purpose behind the act is not an element of the crime. Moreover, to be guilty of first degree arson one must destroy an "occupied structure," contrast that element with second degree arson, which is implicated on the destruction or damaging of "any property." *See* Wyo. Stat § 6-3-10(a) *and* Wyo. Stat. § 6-3-102(a).

For instance, a disgruntled client (without any interest in the business) who maliciously bums down a car dealership after a dispute would implicate first degree arson, without implicating second degree arson. This is so because the intent was to destroy the dealership's property by fire, not to obtain insurance proceeds. On the other hand, when an owner of a rare impressionist painting burns that painting in an effort to obtain the insurance proceeds, he has committed second degree arson, without implicating first degree arson. Obviously, each statute requires the proving of an element not contained in the other. Therefore, Strickland's separate convictions for first and second degree arson, and their concomitant sentences, do not violate the double jeopardy clause of the Fifth Amendment.[2]

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[2] The Court also needs to point out that the Petitioner's sentences in this case are running concurrently to each other. This fact raises another issue, namely, that his second sentence for second degree arson will not increase his overall sentence because it represents less time than his sentence for first degree arson. The fact that his sentences run concurrently demonstrates that even if we were to vacate his second degree arson conviction he would still receive no practical relief.

B. Fourth Amendment Right to be Free from Unreasonable Search and Seizure

Strickland argues that the Wyoming Supreme Court incorrectly, and unreasonably, refused to apply *Michigan v. Clifford,* 464 U.S. 287 (1984), in determining whether the district court had erred in denying his motion to suppress evidence. Specifically, Strickland argues that the police acted in violation of the Fourth Amendment when they searched his house without first obtaining a search warrant. Strickland argues that after the June 17, 2000 investigation uncovered potentially criminal conduct, that the subsequent search on June 18, 2000 should have been conducted pursuant to a search warrant. Strickland asserts that any consent given to search his home after June 17, 2000 was obtained fraudulently. Moreover, Strickland argues the scope of the June 18, 2000, search exceeded any consent that he may have given. Specifically, that he had only given consent to search for the "cause and origin" of the fire in the basement, and he did not consent to a full search of his house to procure evidence of a criminal undertaking--for instance photographs of the inside of the house.

In determining whether Strickland's Fourth Amendment rights were violated the Wyoming Supreme Court held:

> [P30] Strickland maintains that we must apply a decision of the United States Supreme Court to the resolution of this issue. In *Michigan v. Clifford,* 464 U.S. 287, 104 S. Ct. 641, 78 L. Ed. 2d 477 (1984), a plurality of the Court held that, absent consent or exigent circumstances, administrative searches into the cause and origin of a fire are subject to the warrant requirement of the Fourth Amendment. *Id.* at 291-92, 104 S. Ct. at 646; *see also Michigan v. Tyler,* 436

> U.S. 499, 504-05, 98 S. Ct. 1942, 1947, 56 L. Ed. 2d 486 (1978). Clifford is not applicable here because the record is very clear that not only did Strickland suspect that the fire was arson himself, he encouraged and facilitated the investigation of the fire, and consented to all the searches which produced incriminating evidence. Applying the standard of review set out above, the district court's decision to deny the motion to suppress was not clearly erroneous, nor did the district court abuse its discretion.

Strickland, 94 P.3d at 1049.

Strickland argues that the Wyoming Supreme Court's analysis is incomplete. In particular, Strickland argues that the consent given to search the premises, after June 17, was obtained fraudulently. Strickland contends that after the June 17 consensual search, the detectives' motives shifted from "cause and origin" to a criminal arson investigation--with him as a suspect. Strickland argues that he only consented to a "cause and origin" search, and not a criminal investigation. Strickland further contends that when specifically asked on June 18 about the search, the investigators told him that they were still in the "cause and origin" stage of the investigation. Under this rubric, Strickland asserts that his consent was involuntary, in that it was not given knowingly and intelligently. Strickland asserts that the Wyoming Supreme Court's failure to analyze the voluntariness of Strickland's consent was contrary to Supreme Court precedent, namely *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973), and unreasonable.

1. ***Stone v. Powell***

From the outset of our analysis, we note that the Supreme Court has severely limited collateral attacks on state court determinations of Fourth Amendment issues. *See Stone v. Powell,* 428 U.S. 494 (1976). In *Stone,* the Court held:

> Where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.

Stone, 428 U.S. at 481-482; *see also Smallwood v. Gibson,* 191 F.3d 1257, 1265 (10th Cir. 1999).

This rule applies to both opportunities to litigate at the trial and on appeal. *See Stone,* 428 U.S. at 494-495 n.37. The Tenth Circuit has held that opportunity for full and fair consideration or litigation includes, but is not limited to, the procedural opportunity to raise or otherwise present a Fourth Amendment claim and the full and fair evidentiary hearing contemplated by *Townsend v. Sain. See Cannon v. Gibson,* 259 F.3d 1253, 1260-61 (10th Cir. 2001) (quoting *Miranda v. Cooper,* 967 F.2d 392, 401 (10th Cir. 1992)); *Townsend v. Sain,* 372 U.S. 293 (1963). "That standard further contemplates recognition and at least colorable application of the correct Fourth Amendment constitutional standards." *Cannon,* 259 F.3d at 1261 (quoting *Gamble v. Oklahoma,* 583 F.2d 1161, 1165 (10th Cir. 1978)).

The record indicates that the Petitioner was afforded the opportunity to litigate this issue at the trial court via a suppression hearing, and on direct appeal before the

Wyoming Supreme Court. In both cases the state court denied the Petitioner relief under the exclusionary rule. The Petitioner has not alleged, nor argued, that he was not afforded the opportunity to litigate this claim before the state court. Therefore, the Petitioner's collateral attack on the state court's determination is not properly before this Court.

We note however that there is some disagreement regarding a district court raising the bar found in *Stone v. Powell* sua sponte. *See Wallace v. Duckworth,* 778 F.2d 1215, 1219-20 n.1 (7th Cir. 1985)(resolving Fourth Amendment claim and holding that *Stone v. Powell* is not jurisdictional and need not be raised sua sponte); *but see Davis v. Blackburn,* 803 F.2d 1371, 1372-1373 (5th Cir. 1986)(holding that federal court may raise *Stone v. Powell* sua sponte in the interest of comity and finality). In this case the Respondent has not raised the issue in either his answer nor in his response brief in opposition to the Petition. For the sake of clarity, and completeness, the Court will now examine the merits of the Petitioner's claims regarding the alleged violation of his fights under the Fourth Amendment.

2. Fourth Amendment Analysis

The Court notes that the Wyoming Supreme Court's analysis of the applicability of *Michigan v. Clifford,* 464 U.S. 287 (1984) was correct and not unreasonable. The need to procure a warrant, pursuant to the Fourth Amendment was obviated by Strickland's consent, which the Wyoming Supreme Court found he had provided time and again. On June 17, Strickland freely admitted the responding police officer into his house, and even intimated that the fire had been deliberately set. *Strickland,* 94 P.3d at 1040. When the evidence technician arrived on June 18 Strickland unlocked the door and admitted him into the home. *Id.* Strickland led

him to pry marks on the garage door. *Id.* The evidence technician also took photographs throughout the house, and inquired as to possible suspects, to which the Petitioner answered with no less than seven names of individuals. *Id.* at 1040-1041. At no time did Strickland object to the technician's gathering of evidence, nor did he indicate that the search was beyond the scope of his previously given consent. Moreover, Strickland's behavior, and actions clearly indicated that he understood that the investigation involved criminal activity, and was not limited to just "cause and origin." The factual findings made by the Wyoming Supreme Court strongly support this conclusion.

The technician, based on observations made at the scene, requested that a fire investigator be sent to continue the investigation. *Strickland,* 94 P.3d at 1041. The investigator arrived shortly thereafter, and obtained permission from Strickland to enter the home. *Id.* After being led to the basement and doing a cursory investigation, the investigator realized that he did not have the requisite expertise on the type of fire involved and requested that the fire chief come to the scene to continue the investigation. *Id.* Upon arrival, the fire chief ascertained that the fire had been deliberately set. *Id.* At no time did Strickland object to the fire chief's investigation. Then, the investigator obtained consent to search from Strickland yet again. *Id.* The Petitioner's behavior is consistent with voluntary consent to search his premises, not only to root out the cause and origin of the fire, but also to investigate an arson--a crime that everybody involved determined had occurred, even the Petitioner himself. The Petitioner's reliance on *Michigan v. Tyler,* 436 U.S. 499 (1978), is inapposite to the present situation. In *Tyler,* the Court was confronted with a situation where no consent was obtained whatsoever, clearly distinguishing it from this case.

Nor do we think that the Wyoming Supreme Court's failure to apply *Schneckloth* was unreasonable and contrary to clear Supreme Court precedent. None of the evidence presented demonstrates the type of oppressive behavior contemplated by *Schneckloth* which overcame the Petitioner's ability to give knowing and intelligent consent to search his house. *Scheckloth,* 412 U.S. at 226 (listing factors that may overcome one's ability to give knowing and intelligent consent). The Court addressed the issue, and held that consent that was a product of duress or coercion, express or implied, is a question to be determined from the totality of the circumstances. *Id* at 227. The evidence dearly demonstrates that the Petitioner was not coerced, nor under duress when he gave consent to have his home searched.

The Wyoming Supreme Court was correct that the underlying facts in this case did not implicate anything other than a garden variety consensual search, and the failure of the Wyoming Supreme Court to apply *Schneckloth,* was not clearly contrary to Supreme Court precedent, nor was it unreasonable. Nor did the Wyoming Supreme Court err in distinguishing *Clifford* and *Tyler* on the basis of the Petitioner's consent.

C. Ineffective Assistance of Counsel

Strickland contends that he was denied the effective assistance of counsel at trial in violation of the Sixth Amendment. Petitioner raises two issues in regard to the effectiveness of his trial counsel. First, Strickland asserts that his counsel erred in failing to call an expert to testify at trial that would challenge the State's theory of the cause and origin of the fire. Strickland next scores his counsel for failing to request appropriate jury instructions, to wit, a "theory of

defense" instruction, an alibi instruction and a specific intent instruction.

Strickland raised these issues before the Wyoming Supreme Court, which applied the well-known, well-settled, standard:

> Under the two-prong standard articulated in *Strickland [v. Washington,* 466 U.S. 668 (1984)] *and Frias [v. State,* 722 P.2d 686 (Wyo. 1995)], as appellant claiming ineffective assistance of counsel must demonstrate on the record that counsel's performance was deficient and that prejudice resulted. In other words, to warrant reversal on a claim of ineffective assistance of counsel, an appellant must demonstrate that his counsel failed to render such assistance as would have been offered by a reasonably competent attorney and that counsel's deficiency prejudiced the defense of the case. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Strickland, 94 P.3d at 1044 (citations and quotation marks omitted).

Next the Wyoming Supreme Court took each of the Petitioner's claims in turn. First the Wyoming Supreme Court disposed of Strickland's claim that not calling an expert witness prejudiced his defense. The court held:

> [P20] The issue of whether defense counsel should have called an expert witness on the subject of the fire's "cause and origin" was first broached in

conjunction with a bevy of pro se post trial motions that included a motion for new trial, a motion to appoint new counsel, and a motion to reconsider previous rulings on similar motions filed by Strickland's attorney. Strickland offered the affidavit of an "expert," Gerald L. Hurst, Ph.D. That affidavit disputed the testimony of the State's experts. In addition, Hurst offered an opinion that an expert was necessary in Strickland's ease and that his availability was well known to defense counsel well before trial. Hurst also attested to the fact that he had made it known to defense counsel that he was willing to work pro bono and that he had sent a copy of his "CV" (curriculum vitae) to Strickland's attorney. However, that CV is not attached to the affidavit nor is it otherwise included in the record. We are unable to ascertain if Hurst really is an "expert," or if his testimony was "necessary," as that term is contemplated by the applicable case law. Strickland's presentation at the motion hearing indicated that defense counsel had consulted with experts but did not call one as a witness because "his testimony would not support my case." Strickland claimed he insisted that Dr. Hurst be called as a witness but defense counsel refused to do so. However, Strickland also related that defense counsel were told by Dr. Hurst that he "felt he would be a detriment to my case if he came to testify for me because he had testified in a trial in North Carolina for a distant cousin of mine ...." This strongly suggests that the decision not to call an expert was a tactical one, and defense counsel opted to rely on intense cross-examination of the State's experts, as well as the lack of evidence placing Strickland at the scene when the fire occurred (the exact time of the fire was never established except that it occurred sometime

> while Strickland was gone on vacation). We conclude that Strickland did not meet his burden of demonstrating that the failure to call an expert witness constituted ineffective assistance of counsel under these circumstances.

Strickland, 94 P.2d at 1045.

As discussed above, the Wyoming Supreme Court applied the *Strickland* test to the defense counsel's tactical choice not to call a potentially damaging "expert witness" to the stand to rebut the prosecutor's expert testimony. Here, Strickland attempts to introduce the testimony that his expert, Dr. Hurst, may have elucidated at trial. Furthermore, the Petitioner states that there was no reasonable tactical reason not to call the expert.

The record clearly shows that the defense counsel in fact did consult with experts, but chose not to call them as experts because they did not support the defense's case. Enter Dr. Hurst, whose credentials have not been offered to any court to hear this matter. The Petitioner now claims that defense counsel's choice not to enter Dr. Hurst's testimony and opinions into evidence at trial was unreasonable and prejudicial to the case. The record belies the Petitioner's contentions. From the record, defense counsel investigated the availability of contrary expert opinion, and decided not to use it. Defense counsel also decided not to utilize Dr. Hurst. Why he chose not to is not clear in the record, except that Dr. Hurst could have potentially been damaging to the defendant because of Dr. Hurst's prior testimony in a trial involving the Petitioner's cousin.

The Wyoming Supreme Court applied the correct standard, and decided that a failure to call Dr. Hurst was not

an unreasonable tactical decision, nor was it prejudicial to the Petitioner's case. The record before this Court on this issue is sparse. The Court has not been presented with the potential expert's CV, nor with the affidavit detailing what his testimony may have been, nor do we have evidence regarding when the defense counsel was aware of the potential expert.

The Petitioner has failed to produce evidence that defense counsel's decision to not introduce Dr. Hurst's testimony was so prejudicial as to deny him effective assistence of counsel. First, the Petitioner has failed to include Dr. Hurst's credentials, has not produced Dr. Hurst's affidavit detailing his proposed testimony. We also note that the Petitioner failed to explain, by clear and convincing evidence, why Dr. Hurst's affidavit was dated six weeks after the date of the trial. The burden of establishing ineffective assistance of counsel is squarely on the Petitioner, a burden that has not been met here. Moreover, on collateral attack, the burden is also on the Petitioner to demonstrate that the State court unreasonably applied federal law, a burden that the Petitioner has likewise failed to meet.

Strickland next scores his counsel for failing to request appropriate jury instructions, to wit, a "theory of defense" instruction, an alibi instruction and a specific intent instruction. The Wyoming Supreme Court decided this issue as well, ruling:

> [Strickland argues that] counsel's further failure to submit proper instructions confirms that counsel was ineffective.[ ] The instructions Strickland claims should have been offered were an alibi instruction and a theory of the case instruction, as well as a specific intent instruction. We have already held above that the district court's instruction with respect to specific

> intent was proper. Our review of the record leaves no doubt that Strickland's "alibi" defense, if it can accurately be described as an "alibi" at all, was comprehensively presented to the jury and argued by counsel. The record is also abundantly clear that Strickland's theory of his case was comprehensively presented to the jury through multiple witnesses and vigorously argued by counsel. Defense counsel was not ineffective for failing to offer such instructions.

Strickland, 94 P.3d at 1044-1045.

Strickland does not provide this Court with clear and convincing evidence to show that his trial attorney failed to properly request the appropriate jury instructions. *See* 28 U.S.C. § 2254(e)(1). The Petitioner gives this Court little evidence that the Wyoming Supreme Court unreasonably determined the facts, or that it unreasonably applied *Strickland. The* Petitioner has not even submitted what jury instructions he feels should have been submitted for approval of the trial court, nor does the Petitioner establish how such a jury instruction would have effectively changed the mind of the jury.

D. Due Process and Sixth Amendment Right to Fair Trial

The Petitioner next argues that the Wyoming Supreme Court erred in not granting him a new trial for alleged violation of his right to due process and fair trial, as guaranteed by the Sixth and Fourteenth Amendments. Specifically, the Petitioner argues that the prosecutor at his trial offered evidence of prior bad acts, even though this evidence had been ruled inadmissable by the trial court. Specifically, Strickland asserts that his right to a fair trial was

breeched by the prosecutor's mention of an unpaid hotel bill, the merits (or lack thereof) of a civil suit Strickland had filed, and evidence that someone filed a lien on Strickland's home. Moreover, Strickland argues that the Wyoming Supreme Court erred in its analysis of the prosecutor's introduction of Strickland's prior mental condition.

The Wyoming Supreme Court addressed each of these issues on Strickland's direct appeal. As to the prosecutor's mention of Strickland's mental health, the Wyoming Supreme Court held:

> [P46] Strickland correctly points out that the district court granted a motion in limine prohibiting any mention of Strickland's treatment at the Wyoming Behavioral Institute, though he did not prohibit testing Strickland's assertions during his civil action that, because of his mental condition and the fact that he was "heavily" drugged, he was not competent to proceed. The prosecutor did broach the latter subject during his cross-examination of Strickland, but only for a purpose allowed under the district court's liminal order. Defense counsel did not object to the questions and answers at the time, and from our review of the record that is because the questions were a valid inquiry into Strickland's ability to recall with accuracy the events that occurred before, during and after the time of the fire. We find no prejudicial error in these circumstances.

Strickland, 94 P.3d at 1053.

As for the unpaid hotel bill, the Wyoming Supreme Court held:

> [P47] Strickland claims the prosecution introduced inadmissible character evidence by stating (i. e., not asking a question, although it was during cross-examination) that Strickland had "skipped out" on his bill at a Casper motel. The State did not attempt to offer any evidence to support this assertion. Defense counsel objected, and the district court sustained the objection. Nonetheless, the prosecutor persisted in arguing his position to the court, and the district court had to repeat its ruling. Given these circumstances, this can only be characterized as misconduct by the prosecutor and an apparent disregard of the applicable rules of evidence, which had been discussed in detail in preliminary motions hearings, as well as throughout the trial. Such disregard of the prosecutor's responsibilities and obligations in the criminal justice process is unacceptable. However, here the district court sustained the objection, and the jury was given both oral and written instructions to disregard any testimony for which an objection was sustained. The district court should also have specifically told the jury that it should disregard the question/statement made by the prosecutor, and defense counsel should have asked for a limiting instruction. In context, however, we think it is clear the jury was informed it could not consider that subject, and we decline to treat this unacceptable conduct as reversible error.

Id.

As for the prosecutor's mention of the lien and Strickland's filing of a civil suit, the Wyoming Supreme Court held:

> [P48] Strickland contends the State attacked his character by eliciting testimony from a witness that he

> had filed a frivolous lawsuit over problems he had with his home. No objection was made to these questions, and in context we conclude the questions and answers were innocuous and not prejudicial.
>
> [P49] Strickland contends that Rule 404(b) was violated when the prosecutor asked a witness if she had to file a lien on Strickland's home because he did not pay her bill for services. She replied that she had. The prosecutor then asked if she noticed how many liens were ahead of hers. Defense counsel objected, and the district court sustained the objection. Here again the district court was remiss in not specifically instructing the jury to disregard the subject of the offending questions. And, once again both of these questions demonstrate the prosecutor's disregard of the statutory and constitutional protections afforded a defendant in the criminal justice system. In context, we find no reversible error.

Id. at 1053-1054.

Referring to these incidents, the Wyoming Supreme Court found that the prosecutor's actions "can only be characterized as misconduct...and an apparent disregard of the applicable rules of evidence, which had been discussed in detail in preliminary motions hearings, as well as throughout the trial. Such disregard of the prosecutor's responsibilities and obligations in the criminal justice process is unacceptable." *Strickland,* 94 P.3d at 1054.

Strickland also argues that the prosecutor engaged in personal attacks against his defense counsel. The Petitioner takes issue with the prosecutor's statement: "It is amazing a defense attorney who has never worked a scene, who has

never investigated a fire, can be an expert and disagree with the clear evidence of all the witnesses." The Wyoming Supreme Court dealt with this issue as well holding:

> [P50] Strickland contends the prosecutor engaged in personal attacks on defense counsel. Personal attacks on defense counsel are impermissible. *Leiker v. State,* 994 P.2d 917, 920 (Wyo. 1999). The words used by the prosecutor in this case were: "It is amazing a defense attorney who has never worked a scene, who has never investigated a fire can be an expert and disagree with the clear evidence of all the witnesses." To begin with, we will identify this as a personal attack on the defense attorney. Secondly, the argument was outside the evidence, because there was no evidence that the defense counsel or Strickland had never "worked a scene" or "never investigated a fire." This cannot be condoned as really being directed at the defendant rather than at defense counsel, as we have held in other cases, including *Leiker. See Lane v. State,* 12 P. 3d 1057, 1066 (Wyo. 2000). This was a personal attack on defense counsel and could only serve to undermine the integrity of the proceedings in this case. However, under the circumstances we are compelled to treat this misconduct as harmless error. W.R. Cr. P. 52(a); W.R.A.P 9.04.

Strickland, 94 P.3d at 1054.

The Supreme Court instructs that "prosecutorial misconduct may so infect the trial with unfairness as to make the resulting conviction a denial of due process." *Greer v. Miller,* 483 U.S. 756, 765 (1987)(citations and internal quotation marks omitted). Furthermore, "[t]o constitute a due

process violation, the prosecutorial misconduct must be sufficient significance to result in the denial of the defendant's right to a fair trial." *Id.* (citations and quotation marks omitted). Moreover, "[w]hen a defendant contends that a prosecutor's question rendered his trial fundamentally unfair, it is important as an initial matter to place the remark in context." *Id.* (quotation marks omitted)(quoting *Darden v. Wainwright,* 477 U.S. 168, 179 (1986)).

Taken together, the statements made by the prosecutor did not rise to the level of denying the Petitioner a fair trial. Nor has the Petitioner provided any evidence that the prosecutorial misconduct severely prejudiced the Petitioner. First, the Petitioner's mental state was raised to question the Petitioner's ability to remember the events to which he testified. The defense did not object to this line of questioning. Second, the prosecutor's questions related to the unpaid hotel bill elicited objections, and the trial court sustained those objections, instructing the jury to disregard the answers to those questions. The jury was given these instructions both verbally from the bench, and again in written form. The third issue raised, namely the prosecutor's discussion of the lien, again was dealt with by defense counsel's objection and the trial court's admonition to the jury to disregard the testimony. Although we cannot condone the prosecutor's lack of respect for the trial court's orders, and the rules of evidence, we do not believe that the statements, taken as a whole, robbed the Petitioner of a fair trial. Simply put, the Petitioner has failed to show that the prosecutorial misconduct fundamentally altered the jury's ability to render a fair and impartial verdict.

Accordingly, and for the foregoing reasons, it is

ORDERED that the Petitioner's petition for writ fo habeas corpus is hereby **DENIED**.

Dated this 15th day of June, 2005.

/s/
ALAN B. JOHNSON
UNITED STATES DISTRICT JUDGE